Filed 12/16/15 P. v. Tranquilino CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JUAN TRANQUILINO,<br><br>Defendant and Appellant. | B263979<br>(Los Angeles County<br>Super. Ct. No. BA397613) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

This matter is before us for the second time. Appellant Juan Tranquilino was convicted of two counts of committing a lewd act on a child under the age of 14, and the court sentenced him to a term of 55 years to life in state prison, including two consecutive terms of 25 years to life, one for each count. In October 2014, this court affirmed the convictions, but remanded the matter to allow the trial court to exercise its discretion in determining whether to impose concurrent or consecutive sentences. At the resentencing hearing, the trial court again imposed consecutive sentences. Appellant contends the court failed to properly exercise its discretion. We disagree and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Proceedings*

In 2012, appellant was charged with three counts of committing a lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a)).[1] The victim in counts one and two was "A.M"; the victim in count three was Veronica M.

At trial, A.M. testified appellant had been a friend of her family since she was approximately two years old.[2] From the time she was six until she turned eight (approximately 10 years prior to trial), he engaged in multiple acts of molestation, including touching her inappropriately on her thighs, chest and

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[1] It was further alleged that appellant committed an offense set forth in section 667.61, subdivision (c) against more than one victim (§ 667.61, subds. (a), (b) & (e)); that appellant had been previously convicted of an offense set forth in section 667.61, subdivision (c); and that in 2002, appellant had suffered a prior conviction, another violation of section 288, subdivision (a), within the meaning of section 667, subdivision (a)(1) and 667, subdivisions (b) through (i). All further undesignated statutory references are to the Penal Code.

[2] For a more detailed recitation of the facts, see our prior opinion: *People v. Tranquilino* (Oct. 14, 2014, B251149) 2014 Cal.App.Unpub. Lexis.

vagina, masturbating in front of her, and once placing his penis inside her vagina. He threatened to do the same things to her sisters if she told anyone.

A.M.'s older sister, Veronica, testified that appellant had been a family friend from the time she was five or six. When she was 10 (approximately nine years prior to trial), appellant began touching her vagina, buttocks and chest, both over and under her clothing. This inappropriate touching continued until her family moved away, when she was 12. Veronica also testified that she saw appellant touch a third sister, Ashley, in a similar inappropriate fashion.[3]

The jury convicted appellant on counts one and three, but was unable to reach a verdict on count two.[4] The jury found true that appellant committed an offense specified in section 667.61, subdivision (c) against more than one victim, that appellant had previously been convicted of an offense specified in section 667.61, subdivision (c), and that appellant had suffered a prior serious felony conviction that was also a prior strike conviction. The court sentenced appellant to 55 years to life, consisting of two consecutive terms of 25 years to life for counts one and three, and an additional five-year term for the prior section 288, subdivision (a) conviction.

B. *Prior Appeal*

In the first appeal, we affirmed the convictions, but remanded for resentencing in light of the trial court's erroneous belief that consecutive sentences

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[3] In addition to the testimony of the victims, the jury heard testimony from sisters M.P., Maria P. and Jessica P. that appellant, who had been a close friend of their family and a godfather to one of the siblings, had inappropriately touched each of them when they were between six and 11 years old, a few years prior to the incidents charged in the information.

[4] Counts one and two both named A.M. as the victim, but covered different periods between 2002 and 2006.

for appellant's two section 288, subdivision (a) convictions were mandatory. (See *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1261-1263.)

C. *Resentencing Hearing*

At the resentencing hearing, the prosecutor contended consecutive sentencing was appropriate due to the seriousness of the crimes, the tender age and vulnerability of the victims, and appellant's exploitation of a position of trust. Defense counsel argued the sentences should be concurrent because the charges were several years old at the time of trial and appellant had not re-offended in the interim, and because appellant had been undergoing counseling.

The court stated that it had reviewed California Rules of Court, rule 4.425 "in deciding and in using [its] discretion in determining whether the count [three sentence] should run concurrent or consecutive [to the count one sentence]." The court found consecutive sentencing appropriate based on: appellant's "prior history," the fact that the incidents "happened over a period of years" between 2002 and 2006, the fact the crimes involved "separate acts of violence and threats of violence against more than one victim," the fact that there were "more than two victims,"[5] and the fact that the crimes were committed "at different times in separate places" and were "not committed so closely in time and place as to indicate a single curative aberrant behavior." Sentence was imposed and this appeal followed.

**DISCUSSION**

Rule 4.425 of the California Rules of Court provides that in deciding whether to impose consecutive rather than concurrent sentences, the trial court may

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[5] With regard to the multiple victim factor, the court observed that "although the third victim's testimony did not come in[,] . . . the court is allowed to consider that [factor] in . . . deciding whether [the sentence] should be concurrent or consecutive."

consider whether "(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 425(a)(1)-(3).) The court may also consider the circumstances in aggravation or mitigation discussed in California Rules of Court, rules 4.421 and 4.423, except: "(1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime . . . ." (Cal. Rules of Court, rule 4.425(b)(1)-(3).) The aggravating factors set forth in California Rules of Court, rule 4.421 include threatening a witness or otherwise attempting to unlawfully dissuade a witness from testifying. The factors set forth in the rules are not exclusive; the court may choose any criteria reasonably related to the sentencing choice. (See Cal. Rules of Court, rule 4.408(a); *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1325-1326.)

A trial court has "'broad discretion to impose consecutive sentences when a person is convicted of two or more crimes.'" (*People v. Leon* (2010) 181 Cal.App.4th 452, 467.) "In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

Appellant contends that it is error to impose a consecutive sentence simply because there are "separate victims and/or separate offenses," and that "the trial court . . . seemed to operate out of a misapprehension that the factors of multiple victims and separate offenses mandated consecutive terms." The record contradicts appellant's contention. The court expressly stated that it was exercising its discretion to impose consecutive sentences, giving multiple reasons for its decision, including appellant's "prior history" of child sexual abuse, the fact

that the charged incidents happened over many years, the fact that the crimes involved threats against others, and the fact that the crimes were not committed so closely in time and place as to indicate a single course of aberrant behavior. At no point did the court attempt to justify imposition of consecutive sentences based on the fact that appellant had been convicted of two acts of molestation against two victims named in separate counts of the information. The court's reference to evidence that there were "more than two victims, although the third victim's testimony did not come in," clearly referred to Ashley. It was not error for the court to rely on the existence of an additional victim in an uncharged crime in determining the appropriate sentence. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 405-406; *People v. Guevara* (1979) 88 Cal.App.3d 86, 93.)[6]

Moreover, even were we to conclude the trial court's reliance on the multiple victim factor was inappropriate, we would not reverse. "Only a single aggravating factor is required to impose the upper term . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) The court cited multiple valid factors in support of its decision to impose the sentence on count three consecutive to that imposed on count one. Appellant does not challenge the court's reliance on those factors or suggest the evidence did not support them. On this record, it is clear the court recognized its discretion and exercised it within legal bounds.

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[6] We note that in *People v. Calhoun*, the Supreme Court rejected the contention that use of the multiple victim factor to support imposition of an upper term sentence is proper where "the charges identifying other victims have been dismissed or the crimes are uncharged," but not where "the victims are each named in separate counts." (*People v. Calhoun*, *supra*, 40 Cal.4th 398, 405-406.) The court found "no persuasive argument to support this distinction." (*Id*. at p. 406.) This case did not involve imposition of an upper term and, in any event, the trial court referred not to the multiple victims in the charged offenses, but on the existence of another victim of an uncharged crime.

## DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.